U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 11/13/2000

IN THE MATTER OF:	*	
	*	
Paul E. Ingram	*	
Claimant	*	
	*	
v.	*	Dated:
	*	
Zeigler Coal Company	*	Case No. 1997-BLA-1818
and	*	
	*	BRB No. 98-1526 BLA
Old Republic Insurance Co.	*	
Employer/Carrier	*	
	*	
and	*	
	*	
Director, Office of Worker's Compensation Programs, United States Department of Labor	*	
Party-in-Interest	*	

DECISION AND ORDER ON REMAND - DENYING BENEFITS

Claimant appealed the Decision and Order - Denying Benefits of Administrative Law Judge J. Michael O'Neill on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901, **et seq.** (The Act). The Benefits Review Board remanded the case to the Administrative Law Judge for reconsideration of the issues noted in the Board's Decision and Order issued February 3, 2000. The case has been assigned to Administrative Law Judge Clement J. Kichuk due to the unavailability of Judge O'Neill.

Background of Case

Paul Ingram initially filed a claim for benefits on January 7, 1980 after he was laid off from his mine job in 1979. DX 30-(1) - (269) Administrative Law Judge John C. Bradley issued a Decision and Order Denying Benefits in March 1985. Judge Bradley credited Claimant with 29 years and eleven months of

coal mine employment and found x-ray evidence was sufficient to establish invocation of the interim presumption of disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1). However Judge Bradley found that rebuttal of the interim presumption was established under 20 C.F.R. §727.203(b)(2) and denied benefits. DX 30 at 41, **et seq.** Claimant appealed and the Board's Decision and Order issued May 26, 1987 affirmed the Judge's denial. DX 30 at 1-2.

Claimant filed the instant duplicate claim on July 25, 1996. Judge O'Neill found the evidence was sufficient to establish a material change in condition. The judge found that the newly submitted medical opinions, blood gas study and pulmonary function study evidence were sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). The judge also found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and that pneumoconiosis arose from coal mine employment under 20 C.F.R. §718.203(b). However the Administrative Law Judge found that Claimant did not show that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b) and accordingly denied the claim.

The Board noted that the Administrative Law Judge did not render any specific credibility findings with regard to the medical opinions under Section 718.204(b). The Board noted it appeared that the Administrative Law Judge credited the opinions of the pulmonary experts and to have merely resolved the conflict between the experts' opinions by a head count. Hence the Board held the judge's conclusion fails to meet the Administrative Procedure Act's requirement that an Administrative Law Judge resolve the conflict between physicians' opinions by considering factors that tend to either bolster or render suspect, the credibility of the reports. 5 U.S.C. §557(c)(3)(A). The Board vacated the judge's findings at Section 718.204(b) and remanded the case to the judge to consider the credibility of the experts' conflicting opinions as to the causality issue.

Claimant argued that the Administrative Law Judge erred in crediting the opinions of Drs. Fino and Selby as they were not of the opinion that Claimant had contracted pneumoconiosis. The Board directed on remand the Administrative Law Judge should consider whether this is a factor that affects the credibility of the opinions of Drs. Fino and Selby at 20 C.F.R. §718.204(b) (citations omitted) in that the judge's finding existence of pneumoconiosis was established by medical opinions under §718.202(a)(4) was not contested by Employer on appeal.

On the issue of total disability the Board directed that the Administrative Law Judge should consider all relevant factors in

determining whether total disability has been established, and not base his decision solely on numerical superiority. The Board instructed on remand the Administrative Law Judge was to reconsider his discrediting the opinion of Dr. Branscomb. The Board vacated the judge's findings of total disability under Section 718.204(c) and finding a material change pursuant to Section 725.309.

The Employer requested reconsideration of the Board's decision and Order dated February 3, 2000 affirming the Administrative Law Judge's decision finding pneumoconiosis under 20 C.F..R. §718.202 and instructing that under **Tussey v. Island Creek Coal Co.**, 982 F.2d 1036 (6th Cir. 1993), he should consider whether a doctor's failure to diagnose pneumoconiosis affects the credibility of that opinion and grant a preference to the treating doctor based solely on the status of the doctor. The Board's Order issued April 25, 2000 denied Employer's motion for reconsideration "as no member of the panel has affirmatively voted to vacate or modify the decision herein."

ISSUES

The Board directs the following issues are to be considered and resolved on remand:

1. Has claimant established with sufficient evidence that there was a material change in his condition, pursuant to 20 C.F.R. §725.309.

2. Is the evidence sufficient to establish that Claimant suffers from a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c), and if so

3. Is the evidence sufficient to establish that Claimant's disabling respiratory impairment was due at least in part to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b); **Peabody Coal Co. v. Smith**, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

4. Whether Claimant has established by a preponderance of the evidence all of the essential elements of entitlement to benefits under the Act §§ 718.3, 718.202, 718.203, 718.204.

Applicable Law and Regulations

Claimant filed the instant duplicate claim on July 25, 1996. Because the permanent Part 718 regulations became effective after March 31, 1980, the merits of this duplicate claim must be determined pursuant to those regulations. The case law of the

U.S. Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, is applicable to the issues in this case.

Medical Evidence in this Case

This Court will consider the following medical evidence as it relates to the issues remanded by the Board:

A
Initial Claim Evidence

a) X-ray evidence 1/15/71 to 6/26/81 as listed in Judge Bradley's Decision and Order Denying Benefits — DX 30-44, 45

b) Ventilatory studies 10/1/74 to 6/26/81 — DX 30-47

c) Blood gas studies 6-4/80 to 6/26/81 — DX 30-48

d) Medical Reports

Dr. West	DX 30-49	Exam 02/01/80
Dr. Gallo	DX 30-49	Exam 06/04/80
Dr. Simpao	DX 30-49	Exam 03/12/81
Dr. Getty	DX 30-49	Exam 06/26/81

B
Duplicate Claim Evidence

Joint Stipulation of Medical Evidence (JX)

a) X-ray evidence 8/30/96 - 5/05/98 — JX-1 p.1-2

b) PFS evidence to which I added — JX 1 p.3

EX 7	5/5/98	Selby	FEV_1 1.83	FVC 3.57

c) ABG evidence to which I added — JX 1 p.3-4

EX 7	5/5/98	Selby	PC02 29	PO2 68

d) Medical Reports (as summarized findings of physicians appearing in Judge O'Neill's Decision and Order Denying Benefits, 7-28-98, pages 6 to 9)

1)	Dr. Simpao and deposition	Exam 8-30-96 10-28-87	DX 8, 9 EX 2
2)	Dr. Gul Sahetya Dr. Gul Sahetya	Letter 6/10/97 Depo 10/10/97	DX 24 EX 1
3)	Dr. Branscomb	review report 1/26/98	EX 6
4)	Dr. Fino	review report 2/12/98	EX 5
5)	Dr. Selby	exam report 5/5/98	EX 7

DISCUSSION

A

MATERIAL CHANGE IN CONDITION UNDER 20 C.F.R. §725.309

Under Section 725.309 this duplicate claim will be automatically denied on the basis of the prior denial, unless Claimant establishes with sufficient evidence that there was a material change in his condition since the denial of his prior claim. Under the standard enunciated by the U.S. Court of Appeals for the Sixth Circuit for establishing a material change in condition the Administrative Law Judge must weigh newly submitted evidence, favorable and unfavorable, and determine whether Claimant has established at least one of the elements of entitlement previously adjudicated against Claimant in the prior claim. **Sharondale Corp. v. Ross**, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, the claimant must establish the existence of coal workers' pneumoconiosis which is totally disabling. **See** 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. **Gee v. W.G. Moore and Sons**, 9 BLR 1-4 (1986)(**en banc**)

Claimant had established the existence of coal workers' pneumoconiosis in his initial claim but failed to prove total respiratory disability and accordingly Judge Bradley denied benefits. The Board affirmed the judge's denial in their decision issued May 25, 1987. Thus Mr. Ingram must establish a material change occurred in his conditions since May 25, 1987 in order to satisfy the requirements for prevailing under his duplicate claim which in turn must also meet the requirements for entitlement under the Part 718 regulations. Since Claimant initially failed to establish total respiratory disability he can now establish a "material change" if the evidence suffices to establish such disability.

Upon my study of all the probative evidence on the issue of respiratory impairment I find the newly submitted evidence is sufficient to establish that Mr. Ingram has suffered a "material change" in his condition as he has become totally disabled due to his respiratory impairment. However, this Court's finding such totally disabling respiratory impairment to exist does not rest upon the unanimous opinion of all the experts whose opinions are contained in this record. While Drs. Sahetya, Selby and Fino have found the Claimant totally disabled by a respiratory impairment, Dr. Branscomb concluded that the Claimant "is not totally disabled by a respiratory impairment." Dr. Branscomb considered that there were no valid pulmonary function studies subsequent to 1985 "that establish any impairment is present." He explained why he found the pulmonary function studies by Dr. Sahetya and Simpao to be invalid and unreliable. His review did not include the examination report of Dr. Selby nor the review by Dr. Fino. I give less weight to Dr. Branscomb's opinion of disability for the reasons I explain **infra**.

I give greatest weight to the opinions of Drs. Fino and Selby on the issue of total disability. Both doctors found Claimant was suffering from a totally disabling respiratory impairment. Dr. Selby reported blood gases at rest on room air showed values qualifying for disability. Prior gas studied did not qualify to establish total disability. Dr. Selby's examination of the Claimant on May 5, 1998 is the most recent report with findings depicting test data which indicates Claimant's latest condition of respiratory impairment. Dr. Selby noted the spirometry results were consistent with a moderate obstructive defect and showed no improvement post bronchodilator. He noted severe decrease in diffusion capacity in the face of moderate to severe obstructive lung defect was suggestive of emphysema. The x-ray showed evidence of bullous emphysema. Dr. Selby is a pulmonologist and a B reader and Dr. Fino has the same qualifications. Dr. Sahetya is a pulmonologist and is not a B reader.

I give great weight to Dr. Fino's opinion for several reasons. He made a detailed review of the evidence which included the reports and depositions by Drs. Sahetya and Simpao, numerous x-rays as well as all the PFS and ABG test studies. Dr. Fino did not review the evidence submitted in the initial claim nor the reports by Drs. Selby and Branscomb. However Dr. Fino's finding Claimant's disabling respiratory impairment is consistent with the subsequent examination report of Dr. Selby who did report a qualifying blood gas study and respiratory impairment shown by pulmonary function testing. Dr. Fino considered improvement after bronchodilator inhalation was a very significant factor. Dr. Selby in turn reported spirometry showed presence of a moderate obstructive defect and no

improvement post bronchodilator. Thus Dr. Fino's finding respiratory disability was subject to improvement has now progressed to a finding by Dr. Selby that respiratory disability no longer is subject to improvement by bronchodilator inhalation.

Dr. Gul Sahetya, a pulmonologist, treated Claimant for about a one year period from 1996 to 1997. Depo. at 30-31. The doctor gave a graphic description of Mr. Ingram's inability to perform his coal mining job. She stated "he is just barely getting by on performing activities of daily living." **Id.** 33. Dr. Sahetya also considered the reversible component to be a significant factor in her determining the etiology of the miner's disabling lung impairment. Dr. Sahetya considered Claimant's extreme shortness of breath was his major respiratory problem which limited his activities the most. Depo. at 27-28. Dr. Sahetya figured the pulmonary function test values which she obtained were valid and supported her opinion of Claimant's pulmonary function disability. She explained her opinion that the Claimant's shortness of breath was measured by Claimant's diffusion capacity being at about 36 percent of predicted. **Id.** She further stated that unlike the FVC and FEV_1, the diffusion "relatively is not effort dependent." **Id.** I find Dr. Sahetya's opinion corroborates the finding of total respiratory disability due to a moderate obstructive abnormality which prevented Mr. Ingram from performing his usual coal mine job.

I find and conclude that the opinions of Drs. Selby, Fino and Sahetya provide sufficient substantial evidence to establish Claimant is totally disabled due to a disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(c)(4). Accordingly I find Claimant has proven with sufficient evidence that there is now a "material change" in conditions pursuant to 20 C.F.R. §725.309. We now come to the decisive issue, whether Mr. Ingram's respiratory disability is due at least in part to coal workers' pneumoconiosis.

Causality of Total Disability - Section 718.204(b)

In this case, the issue of causality by pneumoconiosis presents itself to the adjudicator cloaked in a mixture of facts in evidence which support each of two opposite opinions.

On the one hand, the initial claim was supported by a preponderance of positive readings of pneumoconiosis which Judge Bradley found sufficient to invoke the presumption of disabling pneumoconiosis under Part 727. The x-rays in evidence were taken during the period from January 15, 1971 to June 25, 1981. The Board affirmed the judge's finding simple pneumoconiosis.

Subsequently Dr. Branscomb reviewed Judge Bradley's decision and stated "Based on the data available prior to 1/8/85, which included predominantly positive x-rays Judge Bradley's conclusion that pneumoconiosis was present was medically appropriate and reasonable." However, Dr. Branscomb noted further that the recent films - 1995, 1996 and 1997 "provide information very different from that available before 1985." He noted that there were seven additional interpretations of which five interpretations by "B" readers were negative for CWP. Dr. Branscomb concluded

> "Based on these x-ray interpretations one must conclude that if in fact the early films were positive the cause must have been a transient or reversible process. Histoplasmosis and many other infections and conditions could cause films to be positive, after which the changes subsequently subsided. In the absence of positive x-rays on recent films, with predominantly negative interpretations, and with no interpretation by a "B" reader as consistent with CWP, the diagnosis of CWP is no longer reasonably tenable medically. Based on the entire record I conclude that Mr. Ingram does not have CWP." Ex. 6

This Court notes Dr. Selby, a "B" reader interpreted the May 5, 1998 film as showing bullous emphysema, no pneumoconiosis.

The Board on remand directed the administrative law judge to consider Dr. Bassali's interpretation of the December 28, 1979 x-ray film as showing "category A complicated pneumoconiosis on top of pneumoconiosis p/s 2/3." DX 30-133. The record indicates readings were made of this same film by Drs. Wright 2/2, Stokes (BCR), 2/1, West, and Staugham (B, BCR), 1/0 - P/Q. Not one other physician made a category A complicated pneumoconiosis interpretation of this film or of any chest x-ray film in the entire record. Thus I find Dr. Bassali's interpretation of Category A complicated pneumoconiosis stands alone and is outweighed by the readings of this same film by Drs. Staugham and Stokes as well as by the weight of the readings of similarly qualified readers finding no complicated pneumoconiosis appearing on any chest x-rays taken before and after the December 28, 1979 film reading by Dr. Bassali.

The Board noted Employer argued that the Administrative Law Judge erred in finding pneumoconiosis established pursuant to Section 718.202. However the Board declined to address Employer's Section 718.202(a)(1) argument as to the sufficiency of the x-ray evidence. The Board ruled that the Administrative Law Judge's finding that legal pneumoconiosis was established by medical opinion evidence pursuant to Section 718.202(a)(4), was

not contested on appeal by the Employer. The Judge's finding existence of pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4) is in full force and effect by the Board's ruling which binds this Court at this point of proceedings in this case.

This ruling raises another significant issue presented by Claimant to the Board. Claimant argued that the Judge erred in crediting the opinions of Drs. Fino and Selby inasmuch as they were not of the opinion that claimant had contracted pneumoconiosis. Dr. Fino stated "There is insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis." Dr. Selby stated that Claimant does not suffer from coal workers' pneumoconiosis. The Board instructed that on remand the Administrative Law Judge should consider whether this is a factor that affects the credibility of the opinions of Drs. Fino and Selby at 20 C.F.R. §718.204(b). Citing **Tussey v. Island Creek Coal Co.**, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

The **Tussey** case contains a significant factor not present in Mr. Ingram's case. The **Tussey** Court noted that once a finding of total disability caused by a respiratory or pulmonary impairment is made, **Tussey** is entitled to the rebuttable presumption in §718.305 that he is totally disabled due to pneumoconiosis. The Court further stated "The presumption may be rebutted only upon showing either that **Tussey** does not have pneumoconiosis or that his impairment did not result from work in coal mines. Island Creek produced no evidence with respect to either rebutting conditions." **Tussey**, 17 BLR 2-25.

In the instant case the Board in effect affirmed Judge O'Neill's finding the evidence sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). The question arises before this Court whether a physician, who finds clinical pneumoconiosis cannot be established by the existing evidence, can provide evidence of probative value that an ailment other than pneumoconiosis caused the miner's totally disabling respiratory condition identified by the adjudicator as legal pneumoconiosis under §718.202(a)(4). The U.S. Court of Appeals for the Fourth Circuit provides the answer in the case of **Dehue Coal Company v. Ballard**, 65 F.3d 1189 (4th Cir. 9/25/95, 19 BLR 2-306).

The Dehue Court stated

> "... We held in **Hobbs II** that once an ALJ has found that a miner suffers from some form of pneumoconiosis, a physician's opinion premised on an understanding that the miner does not suffer from coal workers' pneumoconiosis may hold probative value. 45 F.3d at

> 821. To begin, the physician's finding that the miner does not have coal workers' pneumoconiosis is not necessarily inconsistent with the ALJ's decision that the miner suffers from pneumoconiosis as it is defined in 20 C.F.R. §718.201. Both conclusions may be accurate because "the legal definition of pneumoconiosis contained in §718.201 is significantly broader than the medical determination of coal workers' pneumoconiosis". **Id.** Moreover, a medical opinion that acknowledges the miner's respiratory or pulmonary impairment but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability."

It has been noted in our case that Drs. Fino and Selby were not of the opinion that Claimant had contracted pneumoconiosis. It is appropriate and I find that the credibility of the opinions of Drs. Fino and Selby is not subject to questionable reliability and I find the opinions do provide evidence of probative value for this Court's consideration of all the evidence relevant to the issue of causality. Dr. Fino and Dr. Selby found Mr. Ingram was suffering from a disabling respiratory or pulmonary impairment which arguably is encompassed within the legal definition of pneumoconiosis contained in Section 718.201. Such relevance does not permit the exclusion of this evidence in this Court's determination as to the existence of substantial evidence for resolving the issue of causality as it is presented by the facts in this case.

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Claimant's initial claim was denied on the grounds that the evidence did not establish a disabling respiratory impairment. Hence while x-ray evidence established Claimant suffered from pneumoconiosis, it was impossible to prove causality of compensable disability.

The Claimant's duplicate claim presents evidence sufficient to establish totally disabling respiratory or pulmonary impairment and yet presents x-ray evidence subsequent to 1985 which cannot support a finding of simple pneumoconiosis. Dr. Branscomb alone offers to explain this phenomenon in some detail in his review of the evidence. However, having concluded Claimant has no disability from a respiratory standpoint, Dr. Branscomb provides no assistance to this Court for determining the causality issue.

Dr. Simpao examined Claimant on August 30, 1996 and diagnosed CWP ½ which he considered caused total disability. He found Claimant had an obstructive pulmonary disease which was related to coal workers' pneumoconiosis because of multiple years of coal dust exposure. DX 8, DX 9. At his deposition Dr. Simpao stated he has to have a positive chest x-ray for a diagnosis of pneumoconiosis. The positive x-ray interpretation was the primary reason for relating Ingram's pulmonary problems to pneumoconiosis. Depo. at 6, 19. Dr. Simpao was not able to state what portion, if any, of Ingram's pulmonary impairment would be due to cigarette smoking diseases and what portion, if any , would he attribute to coal dust exposure. He stated "both are significant I guess." Depo at 17, 18. Dr. Simpao stated he was in general practice and "had some specialty in the chest." **Id.** at 3. I give no weight to Dr. Simpao's opinion of causality. His finding pneumoconiosis by x-ray was discredited by Dr. Fino who also found the pulmonary function study to be invalid. Dr. Branscomb noted even if the function studies had been valid the impairment would be minimal. Dr. Branscomb agreed with Dr. Simpao that smoking induced disease is typically obstructive. He noted Dr. Simpao indicated that if the x-ray were negative he would have attributed the pulmonary impairment to cigarette smoking. I find Dr. Simpao's opinion is not well reasoned and not supported by objective test data. His statements of disability and causality are laden with equivocation and lack reliability.

Dr. Gul Sahetya treated the Claimant for about one year and examined him on October 8, 1996. She diagnosed Mr. Ingram primarily with black lung disease and secondarily with emphysema, asthma, pulmonary fibrosis of coal miner's pneumoconiosis. She found Claimant's condition rendered him disabled for employment. In her opinion Claimant's condition resulted from his coal mine employment. Dr. Sahetya interpreted a chest x-ray showed interstitial disease compatible with pneumoconiosis and emphysema. The doctor is a pulmonologist and is not a B reader. Dr. Sahetya placed great reliance upon the values she obtained from Claimant's pulmonary function studies which demonstrated a severe diffusion defect. In her opinion even if Claimant quit smoking and even assuming his entire obstructive component was thereby resolved, that still would leave Claimant with his diffusion defect and the fibrosis and resultant disability. The doctor reasoned that these impairments give Claimant more functional disability than his air ways obstruction because the reversible component at 66 percent of predicted would permit an active lifestyle. In her opinion the Claimant's diffusion component does not change and leaves him dyspneic and impaired. This impairment the doctor attributes to the coal workers' pneumoconiosis. Depo at 33-35.

Dr. Branscomb made a detailed analysis of the October 8,

1996 pulmonary function studies administered by Dr. Sahetya. He noted the tracings are "clearly invalid. There are only two tests recorded. Dr. Branscomb found "The tracings show that the spirographic curves are definitely not maximal and cannot be used to estimate Mr. Ingram's true function. Based on that, and on the comments above concerning failure to exhale the whole vital capacity, I am unable to accept as valid the results of the lung volume and diffusion tests." Ex. 6 at 4. Dr. Branscomb's expertise in lung diseases lends reliability to his analysis of the October 8, 1996 pulmonary function studies.

Dr. Fino also found the October 8, 1996 pulmonary function study to be invalid because of a premature termination to exhalation and lack of reproducibility in the spirometry tracings. He noted the MVV value underestimates this man's true lung function and should not be used as medical evidence of respiratory impairment. Dr. Fino disagreed with Dr. Sahetya's significance she attributed to the resultant diffusing capacity. He also disagreed with Dr. Sahetya's comments that the type of abnormalities seen in pneumoconiosis are horizontal and diffuse. Dr. Fino explained further

> Going back to the diffusing capacity, Dr. Sahetya feels that there was another condition, fibrosis, contributing to the reduction in diffusion. Diffusing capacity abnormalities may be seen in coal mine dust related pulmonary conditions, but they occur when there is very significant fibrosis such as a Category II or III coal mine dust related condition. Furthermore, one only notes mild reduction in diffusion. EX 5 at 6-7.

Dr. Fino also disagreed with Dr. Sahetya reporting chest x-ray and CT scan reports suggested diffuse fibrosis with honeycombing. "One does not see honey-combing in a coal mine dust related condition. However, no pulmonary fibrotic diagnosis was made based on the transbronchial biopsies. I believe that all this man's lung disease is related to cigarette smoking." Fino explained that irregular opacities in the lower lung zones due to smoking may mimic irregular fibrosis.

I find Dr. Sahetya's opinion of causality is seriously reduced in reliability for the reasons explained by Drs. Branscomb and Fino. In their analysis of Dr. Sahetya's findings the doctors point to the invalidity of the pulmonary function studies upon which Dr. Sahetya based her evaluation of disability due to coal dust inhalation. Dr. Fino is persuasive in explaining that Dr. Sahetya made an erroneous interpretation of the abnormalities appearing on chest x-ray and in her evaluation of the diffusion impairment factor as a key to

causality of disability due to coal workers' pneumoconiosis. Dr. Fino explains evidence is present in this case of disabling lung disease due to cigarette smoking. Dr. Sahetya persists to hold the diffusion impairment and x-ray abnormalities as the principal factors establishing pulmonary disability due to pneumoconiosis. However, this Court must find that substantial evidence exists in the record that discredits both factors as the basis for Dr. Sahetya's opinion. The x-ray evidence submitted with the duplicate claim does not support finding pneumoconiosis. The diffusion impairment factor adopted by Dr. Sahetya is derived from an invalid pulmonary function study. I find Dr. Sahetya's opinion of causality is not credible, and is not supported by objective medical test data. Dr. Sahetya's opinion of causality is outweighed by the better reasoned opinions of Drs. Fino and Selby, who, like Dr. Sahetya are pulmonologists and are B readers.

I give great weight to Dr. Fino's opinion of causality. While Dr. Fino finds no evidence of clinical pneumoconiosis, he does not rest there but goes further and points to the evidence in the record which establishes causality of disability due to an ailment other than coal dust exposure. Dr. Fino's finding causality due to smoking does not result from a finding of no pneumoconiosis but is based upon objective test data which provides substantial evidence supporting his conclusion of such causality. Thus I find his opinion is well reasoned, persuasive and inescapably sound. Dr. Fino justified his conclusion in stating "There is a disabling respiratory impairment arising out of the inhalation of cigarette smoking." Dr. Fino clearly supports Dr. Selby's opinion of disability and lung impairment due to cigarette smoking.

Upon examining the Claimant on May 5, 1998 Dr. Selby has submitted the most recent medical evidence in the entire record which provides his assessment of Mr. Ingram's pulmonary and respiratory condition. I gave greatest weight to Dr. Selby's assessment and conclusion of total disability, **supra**. Although Dr. Selby did not review additional evidence, his own examination of the Claimant is thorough, complete and properly focused upon determination of respiratory and pulmonary impairment, which he found to be disabling, due to smoking. He noted Claimant's occupational history as well as his medical history. Dr. Selby also noted Claimant's smoking from age 16 to current age of 77 or 61 years, about one-half-pack per day or 30 pack years. The laboratory test showed carboxyhemoglobin is 3 with normal smoker 1.5 - 5.0.

Dr. Selby's assessment included his findings of total disability due to smoking. He stated his assessment was "based on Mr. Ingram's occupational and medical history, physical examination, chest x-ray with B reading, arterial blood gas,

carbon monoxide studies, pulmonary function studies, oximetry, and was based on a reasonable degree of medical certainty." While he opined Mr. Ingram does not suffer from coal workers' pneumoconiosis, Dr. Selby found "Mr. Ingram has a moderate to severe degree of emphysema from many years of cigarette smoking. Mr. Ingram also has bronchial asthma that is continuing to be exacerbated by his current, though minimal, smoking." Dr. Selby explains

> Any respiratory or pulmonary impairment Mr. Ingram has is not a result of coal mining employment or coal mine dust exposure, but is a result of previous cigarette smoking causing bullous emphysema and the development of bronchial asthma that is being exacerbated by continuing cigarette smoking through the years.
>
> If Mr. Ingram had never set foot in a coal mine he would have the same pulmonary function testing.

I give great weight to Dr. Selby's opinion of disability due to smoking. As an examining physician his expertise as a pulmonologist is apparent in his detailed examination of the Claimant's lung function and reliance upon the uncontested validity of his medical test data which unequivocally supports his opinion of disabling lung impairment due to 61 years of cigarette smoking. Any challenge to his credibility because of negative chest x-ray interpretation is safely dispelled by the negative readings of all the B readers of all the chest x-ray interpretations submitted in the duplicate claim.[1]

Thus I find the opinions of Dr. Selby and Dr. Fino are well reasoned in their respective analyses of the medical evidence present in the record to establish causality of disabling respiratory impairment due to cigarette smoking and not due at least in part to coal dust exposure. I find the opinions of Drs. Fino and Selby are supported by substantial evidence and are sufficient to establish causality of disability due entirely from tobacco abuse.

ENTITLEMENT

I find Claimant has established with sufficient evidence that he suffers from a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c) and has also established with

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[1] Dr. Sargent interpreted the August 30, 1996 film showed category 1/O, S/S which Dr. Fino explained was not consistent with the coal mine dust related pulmonary condition. Dr. Sargent's report contains notation "Not CWP". DX 11

sufficient evidence that a material change in conditions has taken place since the denial of his initial claim by the Benefits Review Board's Decision and Order issued May 26, 1987. 20 C.F.R. §725.309.

I find Claimant has failed to establish with sufficient evidence that his totally disabling respiratory or pulmonary impairment was caused at least in part by pneumoconiosis, pursuant to 20 C.F.R. §718.204(b).

Since Claimant has failed to prove all of the essential elements of entitlement to benefits, his duplicate claim must be disallowed.

DECISION AND ORDER

It is **ORDERED** that the claim of Paul E. Ingram for benefits under the Act, is **DENIED**.

_____
Clement J. Kichuk
Administrative Law Judge

Boston, Massachusetts
CJK:jl

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Order may appeal it to the benefits review Board within thirty (30) days from the date of this order by filing a Notice of Appeal with the Benefits Review Board; U.S. Department of Labor; Room S-5220, FPB; 200 Constitution Avenue, N.W., Washington, DC 20210; ATTN: Clerk of the Board. A copy of this Notice of Appeal must also be served on Donald S. Shire, Esq.; Associate Solicitor for Black Lung Benefits; U.S. Department of Labor; Room N-2117, FPB; 200 Constitution Avenue, N.W.; Washington, DC 20210.